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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 643

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS,

Petitioner,

vs.

FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

Opinion Below

The Circuit Court of Appeals for the Tenth Circuit reversed the District Court without opinion upon the authority of *Johnston* v. *Wright*, (Ninth Circuit), 137 F. (2d), 914 (R. 43) and on February 12, 1948, denied rehearing (R. 48). The findings of fact and conclusions of law of the trial court are found at pages 18 and 19 of the record.

Jurisdiction

Section 240 (a) of the Judicial Code (Title 28, Section 347 of the United States Code), confers jurisdiction herein.

Statute Involved

Missouri Revised Statutes Annotated, Cumulative Pocket Part (1947), Section 8992.39, Volume 19, is quoted in the government's brief, footnote 11, p. 24.

Question Presented

We think the question somewhat different than that recited by the Petitioner. Respondent, pursuant to a sentence imposed by Missouri courts was confined in the state penitentiary. The sentence will not expire until August 26, 1948. (R. 26) Upon parole by the Missouri parole authorities on May 13, 1947 he was surrendered by the Missouri jailer to the federal authorities. (R. 26-11) The order of parole does not recite, as a condition of parole, that respondent begin serving his federal sentence or even that he be surrendered to federal authorities. (R. 25-26) Therefore, the question seems to be whether the federal authorities could take Respondent into custody pursuant to the federal judgment (R. 10) at a time prior to the expiration of the state sentence, without the consent of Missouri authorities.

Secondly, we submit, it must be determined whether the jurisdiction of the Missouri courts was exhausted when Respondent was paroled, or whether jurisdiction was retained until the parolee completed his sentence.

The Facts

Respondent was convicted of larceny in Missouri. His sentence will expire August 26, 1948 (R. 26). However he was paroled on May 13, 1947. The instrument granting parole provided: (R. 25-26)

"Fred C. Martin, No. 58857, now confined in the Missouri State Penitentiary who was convicted and sentenced in the county of Grundy on the 27th day of September 1945, and received at the Penitentiary on the 28th day of September 1945, for a term of 3 years, for the crime of PG: Larceny of an auto which sentence expires on the 26th day of August 1948, is hereby released on Parole, which may be revoked without notice, by the Board of Probation and Parole, by virtue of the authority conferred by law upon said Board of Probation and Parole.

"It is therefore ordered that Fred C. Martin be released on the 13th day of May 1947, upon the following conditions:

"That the above-mentioned recipient shall remain in the legal custody of the Missouri State Penitentiary, but shall be amenable to the orders of the Board of Probation and Parole until the expiration of the maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole."

His release from state custody was effected by delivery to the custody of Federal authorities. (R. 25 and 31). Delivery to Federal authorities was made pursuant to a sentence imposed by the Federal District Court in Missouri (R. 6), which was to begin to run at the expiration of the sentence then being served by respondent in the Missouri penitentiary (R. 6). As hereinbefore indicated, that sentence will not expire until August 26, 1948. Respondent sought release on the grounds that he cannot be taken into federal custody until the state jurisdiction is exhausted by the completion of his state sentence.

I

Argument

Counsel submits that had the federal sentence provided that his sentence was to begin upon his release or discharge from state prison, rather than upon the expiration of the sentence imposed by the Missouri courts, the case would

not be here, *cf. Kirk* vs. *Squier, infra*. If the terms of his parole had directed his delivery to federal authorities as a condition of his parole, he could not complain.

The simple fact that cannot be avoided by any technicality of construction is that the prisoner was and still is in the custody of Missouri. The federal sentence by its own terms does not begin until the Missouri sentence expires. Under rules of comity it cannot begin until the jurisdiction of Missouri courts has been exhausted by expiration of the sentence or surrender by the sovereign. However, we believe that because of the terms of the federal sentence, the principles of comity are not applicable.

An analysis of the Missouri parole statute is appropriate in order to determine the status of respondent.

Section 8992.39, Volume 19, Missouri Revised Statutes Annotated, Cumulative Pocket Part (1947) provides the parolee shall remain in the legal custody of the institution from which released.

The order granting parole said nothing relative to release to federal authorities. (R. 25-26)

The latest expression of the Missouri Supreme Court relation to parole is found in *State* v. *Brinkley*, 354 Missouri, 1051, 193 S. W. (2d) 49, 58 (1946). There, it was held:

> "It (parole) is rather a conditional release of the prisoner from confinement having as its objective his rehabilitation * * *. The prisoner is conditionally released from physical custody but his conviction and sentence remain in force and he continues in *constructive custody.*" Citing:
>
> *46 C. J. 76, page 1208;*
> *39 A. J. 91, page 577;*
> *Herring v. Scott, (Missouri Supreme Court) 142 S. W. (2d) 671, 672;*
> *Ex parte Kabritch, 343 Mo. 196, 197, 120 S. W. (2d) 42, 43(2);*
> *State v. Jennings, 278 Mo. 544, 551 (I), 213 S. W. 421, 422.* (Italics ours.)

In Mattes v. *Taylor* (*Supreme Court of Missouri, 1941*) *348 Mo. 434, 153 S. W. (2d) 833* the prisoner was paroled or conditionally pardoned by the Governor of Missouri. The State of Washington was seeking to extradite him. The Missouri Governor consented, but the prisoner contended that he could not be extradited. The Court held that even though the prisoner was on parole he was still under sentence and the sovereign may consent. We respectfully invite the attention of the Court to the fact that this record does not indicate consent by Missouri.

It is submitted that under Missouri law, the prisoner, although paroled, is still under Missouri jurisdiction. Under well established principles of comity, the Federal authorities could not take him into custody. *Taylor* v. *Taintor*, 16 Wallace 366, 21 L. Ed. 287.

The act of the State jailers in surrendering him to Federal authorities was without authority of law. The Federal officers who took him from the Missouri jurisdiction could act only pursuant to the judgment of the Federal court. That judgment provided that the Federal sentence should begin to run at the expiration of the sentence then being served by the petitioner in the Missouri penitentiary. Consequently, the Federal authorities were without right in taking the respondent into custody until the expiration of that sentence. The language of this Court in *Hill* v. *United States ex rel. Wampler*, 298 U. S. 460, 80 L. Ed. 1283-1286, is particularly pertinent.

> "The only sentence known to the law is the sentence or judgment entered upon the records of the court."
>
> "• • • A warrant of commitment departing in matter of substance from the judgment back of it is void."
>
> "• • • Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus."

The respondent maintains that until the expiration of his Missouri sentence on August 26, 1948, at which time the commitment in the Federal court takes effect, no valid commitment could be issued. The accelerated commitment issued in this case was void.

II

The Status of Parolee

The status of one on parole should be determined in order to properly evaluate the question presented herein. The granting of parole merely extends the walls of the penitentiary and releases the convict from imprisonment upon conditions imposed by the parole authorities. He is subject to be recalled and complete his sentence. He is not free. The sentence continues until it expires by its terms. It is merely a different manner of serving a sentence other than by confinement in prison.

In *Fuller* v. *State*, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502, the Alabama Supreme Court stated:

> "The parole does not in any wise displace or abridge the sentence. It merely stops its execution for a time only."

In the case of *Ex parte Patterson, 94 Kan. 439, 146 Pac. 1009, L. R. A. 1915F 541*, the court said that a parole is not a vacation of the sentence imposed:

> "It suspends the execution of the penalty, and temporarily releases the convict from imprisonment upon conditions which he is at liberty to accept or reject." (544)

See also *39 American Jurisprudence page 525, section 11; page 572, section 82; Woods v. State, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F 531; Ex parte Ridley, 3 Okla. Crim. Rep. 350, 106 Pac. 549, 26 L. R. A. N. S. 110.*

In *Crooks* v. *Sanders*, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940, the South Carolina Supreme Court discusses the meaning of parole and indicates that it is a leave of absence from prison bounds.

In the case of *Sellers* v. *Bridges*, 153 Fla. 586, 15 So. (2d) 293, 148 A. L. R. 1240, the Court said of parole (Page 1241):

> "The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody? See *Carpenter* v. *Lord*, 88 Or. 128, 171 P. 577, 579, L. R. A. 1918 D 674, 677.
>
> "Parole is that procedure by which a prisoner who must in any event be returned to society at some time in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society."

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> "Parole, therefore, is not an act of amnesty or forgiveness—as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence."

In the case of *Anderson* v. *Corall*, 263 U. S. 191, 196, 68, L. Ed. 247, 254, this Court was interpreting the Federal parole law and stated:

> "The parole authorized by the statute does not suspend service or *operate to shorten the term*. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the

> expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is, in legal effect, imprisonment. The sentence and service are subject to the provision of § 6, that if the parole be terminated, the prisoner shall serve the remainder of the sentence originally imposed without deduction for the time he was out on parole." (Italics ours)

The Federal parole statute is found in *Title 18, Section 716 et seq. of the United States Code. Section 717* provides for retaking in the event of violation of parole. However, the Federal Statute (Section 716) does provide that he shall remain in the legal custody and under the control of the warden until the expiration of the term specified in his sentence while section 716b provides that the parolee may be surrendered to State authorities. We find nothing comparable to the latter in the Missouri statutes (Vol. 19, Section 8992.39 Missouri Revised Statutes). In the instant case the respondent remained in the legal custody of the Missouri State Penitentiary by the very terms of the order granting him parole (R. 26).

It is interesting to note that in the case of *Rosenthal* v. *Hunter*, 164 F. (2d) 949, 950 (C. C. A. 10, 1947), perhaps the latest expression on the status of a paroled prisoner, the Court held:

> "A prisoner on parole is constructively a prisoner of the state in the legal custody and under the control of the state board of prisoner directors."

The aforementioned authorities conclusively indicate, we believe, that Missouri retains jurisdiction until final release of the prisoner. Then, and then only, could he be taken into custody pursuant to the judgment of the Federal court.

III

Analysis of Federal Cases

The opinions of the Ninth and Tenth Circuits are apparently in conflict with the Seventh Circuit. In order to resolve that conflict this Court granted certiorari.

In the instant case the Tenth Circuit followed the reasoning of the Ninth in the case of *Johnston* v. *Wright*, 137 F. (2d) 914, and without opinion reversed the judgment of the District Court. The Seventh Circuit in the case of *Lombardo* v. *McDonnell*, 153 F. (2d) 919, was unable to agree with the Ninth Circuit.

Respondent relies upon *Johnston* v. *Wright, supra.* There, Wright was sentenced by the Illinois court and while on parole and at large was again tried and convicted in the State court. His sentence was one year to life. While serving this sentence, he was by means of a writ of *habeas corpus ad prosequendum* tried and convicted in a Federal court and sentenced to ten years. The Federal sentence was *to begin upon the expiration of the sentence he was then serving in the Illinois State Penitentiary.* Wright complained to the Federal authorities that he could not make parole in the State proceedings as long as a Federal detainer was placed against him and upon inquiry from the Federal to the State authorities, the latter indicated that "the fact of the Federal detainer would be an important factor in his being given a parole much sooner." Eventually he was paroled effective *when the Federal authorities came for him.* If not taken, the case was referred back to the Board.

Wright's contention (not material here) is that his State and Federal sentences were concurrent and therefore both sentences had been served. The contention was rejected.

The warden maintained that the Federal sentence began to run when Wright was *released* from the State prison. The C. C. A. 9th said:

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"We think the warden's position cannot be sustained because the starting of the sentence is premised upon the expiration of the state sentences and not upon Wright's release from the state prison. The text of the sentences does not permit of the interpretation suggested by the warden. We do not deem the sentences void for indefiniteness. For authority bearing on this point but not covering the exact question here, see *Wall* v. *Hudspeth, 10 Cir., 108 F. 2d 865; McNealy* v. *Johnston, 9 Cir., 100 F. 2d 280, 282; Brown* v. *Johnston, 9 Cir., 91 F. 2d 370, 372; Austin* v. *United States, 9 Cir., 19 F. 2d 127, 129.* It is true that a court may surrender the custody of a person to the custody of a court in another jurisdiction under the principle of comity (*Wall* v. *Hudspeth, 10 Cir. 108 F. 2d 865; Ponzi* v. *Fessenden, 258 U. S. 254, 260, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879*) as the warden-appellant here contends. But that is not the point in the instant proceeding. Here the point is that there is no sanction for the federal jurisdiction to have Wright's custody at all because the event that awakens the federal sentences from a dormant state has never happened."

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"The evidence clearly shows that Wright's discharge from the Illinois prison was not based upon any showing whatever that the state sentences have expired. He was released from state prison nominally on parole, but actually his custody was merely transferred to the federal authorities for further imprisonment in a federal institution. Wright's state sentence was one year to life. There is no evidence whatever that this indeterminate sentence had been fixed to the period he had served in the state prison."

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"The Illinois parole law gives no authority to the Department of Public Safety, Division of Correction, which governmental agency issued the parole, to terminate a court sentence. Incidentally, it does not appear to give authority to any parole officer or board to parole a prisoner to officers of another jurisdiction for the purpose of subjecting the prisoner to a sentence obtained in the other jurisdiction."

We invite the Court's attention to the Missouri statutes, which, likewise, fail to give to the parole authorities the right to terminate a sentence.

In *Stamphill* v. *Johnston* (C. C. A. 9th, 1943), 136 F. (2d) 291, a petition for a writ of habeas corpus was filed by the petitioner who was confined in Federal prison pursuant to a commitment of a Federal district court in Oklahoma. Prior to his Federal commitment, he had been sentenced to life imprisonment in Oklahoma but the warden of the State penitentiary surrendered him to the Federal courts for trial which resulted in conviction and sentence. Appellant maintained that as long as he was in the State penitentiary prior to Federal trial and commitment he should finish his State sentence before being required to serve his Federal sentence on the ground that the State first acquired jurisdiction.

The Court said: Page 292

"There is no doubt that the state of Oklahoma, having first acquired jurisdiction over the appellant, was entitled to retain him in custody until he had finished his sentence and could not be required to surrender him to the custody of the United States marshal for trial in the federal court for an offense committed in violation of federal law. *Ponzi* v. *Fessenden*, 1922, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879, Cf. *Ableman* v. *Booth*, 21 How. 506, 62 U. S. 506, 16 L. Ed.

169, and 28 U. S. C. A. § 453. However, in this case the state authorities did in fact surrender the appellant to the federal authorities, and thus in effect gave the federal court jurisdiction to try the appellant and to render judgment of imprisonment against him and to execute that judgment."

On the question of comity, the Court said:

"'Courts of the United States are bound to proceed to judgment * * * in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.' *Hyde* v. *Stone, 20 How. 170, 61 U. S. 170, 175, 15 L. Ed. 874.* However, the defendant was brought before the District Court, once he was there it had and was bound to exercise complete jurisdiction over him. It is clear that the federal authorities had actual possession of appellant during his trial in the federal court. Jurisdiction resulted from that possession and it follows that any question concerning the rightfulness of what was done in the exercise of that jurisdiction is merely a question of comity. Such a question cannot be raised by habeas corpus, which can be used to question the validity of imprisonment only upon jurisdictional grounds (*Price* v. *Johnston, 9 Cir., 125 F. 2d 806*) or on the ground, not presented by this case, of violation of a fundamental constitutional guarantee. *Waley* v. *Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.*"

The Court also said that any arrangement between the two sovereigns does not concern the defendant.

We find in *Grant, et al.* v. *Guernsey,* 63 F. (2d) 163 (10th Cir.), that in September, 1930, appellee was indicted in the U. S. District Court for Kansas. The indictment alleged a violation of the National Banking Act. He was convicted, sentenced to three and one-half years, but placed on probation.

The State instituted a prosecution for embezzlement committed prior to his sentence in the Federal court.

Guernsey protested that he was under the jurisdiction of the Federal court, *subject to its orders* and that the proceedings before the State justice were an interference with that jurisdiction and could not be maintained.

The Court said:

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> "There can be no doubt Guernsey was under the jurisdiction of the federal court, subject to its orders under the probation statute at any time; and when the justice of the peace issued his warrant for the arrest of Guernsey and then held him for trial on the state charge and that he abide the judgment of the state court, there was a direct interference with federal jurisdiction, and a violation of the rule of comity between federal and states courts."

The Court cited *Taylor* v. *Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, and reiterated that the sovereignty first taking jurisdiction retained it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted.

In *Lunsford* v. *Hudspeth*, 126 F. (2d) 653 (10th Cir.) the Court said: 655

> "It is equally well settled that unless founded upon some matter justifying the exercise of federal authority necessary to enforcement of rights, and immunities granted by the constitution, laws and treaties of the United States, no court, or judge thereof, can issue a writ of habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a State court for any other reason, than to be used as a witness in the trial of a cause. *Ex parte Burrus, 136 U. S. 586, 10 S. Ct. 850; 34 L. Ed. 500; Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; Ex parte Johnston, supra; Ex parte Burrus, supra, and In re Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55. See, also, Velazquez* v. *People of Puerto Rico, 1 Cir., 77 F. 2d 431.*"

In *Wall.* v. *Hudspeth* (C. C. A. 10th, 1940) 108 F. 2d 865 the Court said: 866

> "But either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner, and in such circumstances the question of jurisdiction and custody is purely one of comity between the two sovereigns, not a personal right of the prisoner which he can assert in a proceeding of this kind. *Ponzi* v. *Fessenden, supra; In re Andrews, D. C., 236 F. 300.*"

The aforegoing authorities seem to counsel for respondent to compel the conclusion that the Missouri courts having first taken jurisdiction retained it to the exclusion of the Federal authorities until the sentence of respondent was completed and its jurisdiction exhausted. As we have heretofore indicated, we do not believe the law of comity is pertinent to this case, because it was the judgment of the Federal court that authorized the imprisonment of respondent and that judgment does not become effective until August 26, 1948.

However, in *Lombardo* v. *McDonnell and Durkin* v. *McDonnell* (C. C. A. 7th), 153 F. (2d) 919, we find a conclusion contrary to *Johnston* v. *Wright, supra.* On July 24, 1936, in a State court, Lombardo was convicted of robbery. On August 7, 1936, he was committed to the Illinois State Penitentiary. While serving the sentence in the State Penitentiary, he was indicted in Federal court and upon a writ of *habeas corpus ad prosequendum* was tried in the Federal court. There he was sentenced to fifteen years. The judgment stated that "*the sentence to commence on the date of the expiration of the sentence under which he is now confined in the Illinois State Penitentiary.*" (identical to instant case). On March 12, 1945, he was paroled from the Illinois penitentiary and was taken in custody by the United States. He challenged the effectiveness of the

United States Marshal's custody on the ground that it was premature and could not be obtained until the expiration of his State parole. He argued that the parole was but an extension of the boundaries of the Illinois penitentiary and relied upon *Johnston* v. *Wright*, 9 Cir., 137 F. (2d) 914. The Court felt that it was not controlling and said:

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"Unquestionably the State of Illinois, having first acquired jurisdiction over appellee, was entitled to retain him in custody until he had finished his sentence, *Stamphill* v. *Johnston*, 9 Cir. 136 F. 2d 291. That rule rests upon principles of comity, and it exists between federal and state courts. *Ponzi* v. *Fessenden*, *258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879.*: While it may be true that when Lombardo was released on parole from the Illinois State Penitentiary he was theoretically a prisoner of the State, yet where a prisoner is on parole from one of two sovereigns, it is for the sovereign granting the parole, and not the prisoner, to determine priority of jurisdiction over him in connection with such parole. *United States ex rel. Demarois* v. *Farrell, 8 Cir., 87 F. 2d. 957,* and the fact that he is subject to the terms of a State parole does not exempt him from being taken by the federal government where no objection is made by the paroling State, *United States* v. *Marrin, D. C., 227 F. 314;* that is to say, 'He may not of right demand priority for the judgment of either.' *Kirk* v. *Squier*, 9 Cir., 150 F. 2d 3, 8.

Durkin was sentenced by a Federal court which was "*to take effect upon his release from custody by the authorities of Illinois*", (quite different from the present case).

In speaking of the interpretation of a Federal sentence, the Court said that the controlling consideration appears to be:

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"Is the language clear; does the language indicate the intent of the court; and does the sentence on its face

raise any doubt on the part of those who must execute it? This we learn from a study of the case of *United States* v. *Daugherty, 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309.* In that case the court at page *363 of 269 U. S., 46 S. Ct. 157, 70 L. Ed. 309* said: 'Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded.'"

The Court continued and said that the sentences of Lombardo and Durkin excluded any serious misapprehensions of those who must execute them and revealed the intent of the court rendering the judgment.

Respondent maintains that Lombardo's position, similar to our own, did not reveal with fair certainty the judgment of the trial court but that Durkin's did.

However, it is submitted that caution in the terms of the sentence or the instrument granting parole would have avoided any difficulty. Under *United States* v. *Daugherty, infra,* and *Hill* v. *United States ex rel. Wampler, infra,* trial courts should use meticulously precise language in judgment entries when sentences for crime are imposed.

In *United States* v. *Daugherty,* 269 U. S. 360, 70 L. Ed. 309, 313, the Court had before it a sentence wherein the defendant was imprisoned for five years on each count of a three count indictment charging violation of the narcotic law. Although this Court sustained the sentence, it did say that:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them."

It further said:

> "This and similar unfortunate causes should admonish the trial courts to require the use of meticu-

lously precise language in all judgment entries. Especial care is essential where sentences for crime are imposed."

The law of comity is too well known to warrant discussion. We find, in the case of *Taylor* v. *Taintor* (1873), 83 U. S. 366, 21 L. Ed. 287, 290, this Court said:

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it, holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. *Hagan* v. *Lucas, 10 Pet., 400; Taylor* v. *Carryl, 20 How., 584 (61 U. S. XV, 1028); Tqutman's case, 4 Zabr., 634; Ex parte Jenkins, 2 Am. Law. Reg., 144.* It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

In *Ponzi* v. *Fessenden*, 258 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879, Ponzi, on September 11, 1920, was indicted in the State Court of Massachusetts charged with larceny. On October 1, 1920, he was indicted in the Federal District Court of Massachusetts. He pleaded guilty in the Federal court and was sentenced to imprisonment and committed. While in Federal custody a writ of habeas corpus was issued to bring him before the State court for trial. The jailer replied that he held Ponzi pursuant to the process of the United States. The Attorney General consented to the issuance of the writ. Thereafter, Ponzi filed a petition for habeas corpus alleging that he was within the exclusive control of the United States and the State court had no jurisdiction to try him.

In passing upon this question this Court held that it was within the powers of the Federal government to consent

to the transfer, and the prisoner had no say in the matter. The court said: Page 883

> "He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws, in order that the other may also subject him to conviction of crime against it. *Re Andrews, 236 F. 306; United States* v. *Marrin, 227 F. 314.* Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it, and of its representatives with power to grant it."

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> "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, *must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose.*"

The Court further said: 884

> "In the case at bar, the Federal district court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment, and was detained under United States authority to expiate the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States."

Be it remembered that in the instant case, the record does not disclose the consent of Missouri. The jailers could not consent or act for the sovereign. There must be more of a relinquishment of jurisdiction by Missouri than is indicated here.

It is of interest to note that in *Kite* v. *Commonwealth*, 11 Met. 581, 585; 52 Mass. 581, 585; Sup. Jud. Ct. Mass. 1846, the Court had before it the question of the certainty of a judgment which imposed a sentence to commence upon the termination of a previous sentence and said through Chief Justice Shaw:

> "The Court are of the opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment of the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference, that the previous judgment is reversed for error. It is voidable only and not void; and until reversed by a judgment, it is to be deemed in full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect."

Respondent's sentence had been neither remitted, shortened nor terminated. It was still in existence and the event which will vitalize the Federal judgment and commitment, viz., the expiration of his Missouri sentence has not yet occurred. Until that time, he cannot be lawfuly committed by Federal authorities.

The *Federal statute*, 18 U. S. C. 709a, providing that sentence is to commence when a prisoner is received into Federal custody, cannot control. It is the judgment of the court that determines the sentence, not the warrant of commitment. *Biddle* v. *Shirley* (C. C. A. 8th) 16 F. (2d) 566, 567.

In *United States ex rel. Chasteen* v. *Denemark* (C. C. A. 7th 1943) 138 F. (2d) 289, 291, the Court said:

> "A sentence in a criminal case should be clear and definite, *Hode* v. *Sanford*, 5 Cir., 101 F. (2d) 290, and be so complete as to need no construction of a court to ascertain its import. It should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or ministerial officer. He must find what the sentencing judge intended from the language which he used. *People* v. *Graydon*, 329 Ill. 398, 160 N. E. 748."
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> • • • "A commitment depends for its validity on the judgment behind it. If the judgment and sentence do not authorize detention, no mittimus will avail to make detention lawful. *Hill* v. *United States ex rel. Wampler*, 298 U. S. 460, 56 S. Ct. 760, 80 L. Ed. 1283."

In *Kirk* v. *Squier*, 150 F. (2d) 3, (C. C. A. 9th, 1945) Kirk was serving a life term in California for kidnapping. Under that sentence there was, under the California law, a possibility of parole. He was indicted in the Federal court for violation of the Postal Laws and was sentenced to thirty-seven years imprisonment. The latter sentence was *"to commence to run upon the release of said defendant from the imprisonment he is now serving."* All this occurred in 1934. He was released on parole in 1942 by the California authorities and the release provided for surrender "to the custody of United States authorities". The latter authorities arrested and imprisoned him in the Federal penitentiary. He appealed from an adverse ruling seeking a writ of habeas corpus and alleged that his California sentence was for the rest of his life and that he should remain in the custody of the State until the expiration of the sentence. The court rejected his contention and stated that the Federal sentence was no longer in abeyance when he

was delivered to Federal custody, and distinguished the *Johnston* v. *Wright* case, *supra*. It noted the particular language used in the Johnston sentence, which provided that it should start upon the expiration of the State sentence, whereas in the *Kirk* case the sentence provided *upon the prisoner's release from the State prison.* Further, it provided that Kirk was released from custody in order that he might be imprisoned by the Federal government and there was a full consent by the State to his control and incarceration by the Federal government. Accordingly, it is believed that *Kirk* v. *Squier* is distinguishable from the instant case.

Conclusion

Respondent submits that the Federal authorities were and are without authority to take him into custody until the expiration of his State sentence on August 26, 1948. The judgment imposing sentence in the Federal court upon which confinement must rest is clear. Missouri did not surrender him. The parole by Missouri authorities did not recite that he be surrendered to Federal authorities. It recited the Respondent was to remain in the legal custody of Missouri (R. 26). Respondent cannot be taken into Federal custody other than pursuant to the District Court's judgment. Missouri, of course, has the power to consent by terminating the sentence or wording the parole order differently, but it did not do so.

The judgment below should be affirmed.

JAMES F. REILLY,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 643.—October Term, 1947.

Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Petitioner,

v.

Fred Clifford Martin.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 24, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner is held prisoner in the United States Penitentiary at Leavenworth, Kansas. He pleaded guilty to charges of forging and uttering United States Treasury checks. He was sentenced to imprisonment for ten years on each count, to run concurrently, and the judgment provided that sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Petitioner was returned to the Missouri authorities to resume the service of a state sentence of three years for automobile theft. On May 13, 1947, before expiration of such period, he was paroled by the State and delivered to the federal authorities, by whom he has since been held. He contends that the federal sentence does not begin until the full term of the State sentence has expired and that, for the period of parole, he is entitled to freedom. The issue as to whether such wording of a federal sentence entitles the prisoner under such circumstances to temporary freedom is one on which Circuit Courts of Appeals are in conflict. Compare *United States, ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919; *Johnston* v. *Wright*, 137 F. 2d 914; *Kirk* v. *Squier*, 150 F. 2d 3; *Martin* v. *Hunter*, — F. 2d —. We brought the

case here on certiorari, 333 U. S. —, to resolve the conflict.

We think it clear that the purpose of the clause deferring commencement of service of the federal sentence was to prevent conflict between the State and Federal Governments. The present federal imprisonment avoids such conflict and achieves that purpose. Missouri authorities have released petitioner from their custody and surrendered him for the apparent purpose of serving his federal sentence and have reserved control over him as a parolee only in event he is not kept in prison during the period of the federal sentence. For all practical purposes contemplated by the judgment, the State sentence has expired—at least insofar as it was an obstacle to service of the federal sentence.

To hold otherwise would mean that a man already finally adjudged guilty of a serious federal crime and sentenced to ten years imprisonment would be left at large and free of all restraint for an interlude between release from the state prison and commencement of the federal term. We do not think such a result is required or intended under the statute, 18 U. S. C. § 709 (a)[1] or under the terms of the sentence as imposed.

The District Court, after full hearing, dismissed the writ of *habeas corpus* and remanded petitioner to custody to serve his sentence. We think this was a correct disposition of the matter. The Circuit Court of Appeals' decision to the contrary is error.

Judgment reversed.

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[1] The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381.